Petition

81-1328

No. ———

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ALEXANDER L. STEVA
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Contrary to this Court's opinion in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the court below rewrote state law as to the burden of proof and scope of coverage in insurance contracts. It did so in conflict with every other federal court which has ruled upon these issues, including two of the other circuits; and it has created a three-way split in the federal decisions as to who must defend the largest block of product liability litigation in American history. With thousands of cases already pending in the federal courts and the prospect of many thousands more as to asbestos and other products, the important questions presented may be variously phrased thus:

(a) Can a federal court reverse established principles of state substantive law in order to "maximize" insurance coverage?

(b) Is a lower court free to ignore its *Erie* obligations because asbestos litigation is different from other kinds of litigation? Can it rewrite well-established law on burden of proof and scope of insurance coverage to reach a social goal believed desirable?

(c) If the *Erie* doctrine still has life, can a federal diversity court refuse to follow decisions of state courts, other than the highest court in a state, when the decisions specifically support the "manifestation" construction of insurance contracts? Can it do so on the theory that resort to state decisions is "unnecessary" if the highest state court has not specifically addressed the precise question?

2. With thousands of asbestos cases already in the federal courts and the certainty that thousands more will be filed as to asbestos and other products, with a split in circuits and with the lower federal courts in hopeless confusion:

(a) Has not the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision" under Rule 17(a)?

(b) Should not this court resolve the conflict when:

(i) The general principles of state law are clear and do not differ from one state to another;

(ii) The federal circuits bound by *Erie* to follow those principles have reached irreconcilable results; and

(iii) The administration of justice in federal courts throughout the country will suffer gravely because of the disarray?

LIST OF PARTIES

Petitioner Liberty Mutual Insurance Company ("Liberty') was a defendant in the district court and an appellee and cross-appellant in the District of Columbia Circuit. Respondent Keene Corporation ("Keene") was the plaintiff in the district court and an appellant and cross-appellee in the District of Columbia Circuit. There were four additional defendants in the district court: Insurance Company of North America ("INA"), Aetna Casualty & Surety Company ("Aetna"), Hartford Accident & Indemnity Company ("Hartford"), and Pennsylvania Manufacturers' Association Insurance Company ("PMA"). INA and Aetna were appellees and cross-appellants in the court of appeals; Hartford was an appellee. The district court granted summary judgment dismissing PMA from the case, and that dismissal was the subject of a separate appeal to the District of Columbia Circuit.

The Rule 28.1 list of corporations affiliated with Petitioner Liberty Mutual Insurance Company is as follows: Liberty International Agency, Inc., Liberty Life Assurance Co. of Boston, Liberty Mutual Insurance (Massachusetts) Limited, and Liberty Mutual Fire Insurance Co.

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LIBERTY MUTUAL INSURANCE COMPANY,
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v.

KEENE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Liberty Mutual Insurance Company respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 1, 1981.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit appears in Appendix A of the Petition for a Writ of Certiorari filed by INA in No. 81-1012, which arises out of the same case as this Petition. That opinion is not yet reported. The opinion and judgment of the United States District Court for the District of Columbia appears in Appendix B of INA's Appendix ("INA App." hereafter), and is reported at 513 F. Supp. 47.

JURISDICTION OF THIS COURT

The opinion and judgment of the District of Columbia Circuit was entered on October 1, 1981. INA App. at 2a. On November 19, 1981, petitions for rehearing and suggestions for rehearing *en banc* were denied. INA App. at 46a-49a. Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 10 to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The diversity clause of Article III, § 2, of the Constitution of the United States provides:

> The Judicial Power shall extend to all Cases, in Law and Equity . . .—between Citizens of different States. . . .

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. INTRODUCTION

In all respects except Judge Bazelon's extraordinary and unprecedented opinion for the court below, the instant case is essentially identical to the *Forty-Eight*[1] and *Porter*[2] cases recently before this Court, and to the *Eagle-Picher* case now in the First Circuit.[3] It is one of some twenty cases in which the courts must determine who is responsible for defending and paying for the largest block of tort litigation in American judicial history, the thousands of underlying asbestos product liability cases that threaten to bring some of the nation's trial courts almost to a standstill.

Liberty described *Forty-Eight* and *Porter* to the Sixth Circuit as "the vanguard of what may be the most important legal issue in the history of the American insurance industry." Brief of Appellee Liberty Mutual, *Forty-Eight*, *supra*, at 4. None of the five other parties or nine *amici curiae* in that case demurred. Even Hartford, which disagrees with Liberty on the merits, labels these "perhaps the most important insurance law issues ever to be litigated in our judicial system." Hartford Petition for Writ of Certiorari, No. 81-1197, filed December 24, 1981, at 3. The District of Columbia Circuit has now confused them immeasurably, by reversing the district court (which followed *Forty-Eight* and *Porter*), and radically diverging from both the reasoning and the result

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[1] *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified and aff'd.*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981) (Nos. 81-198 and 81-199).

[2] *Porter v. American Optical Corporation*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981), (No. 81-200).

[3] *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*, 523 F. Supp. 110 (D. Mass. 1981), *appeals docketed*, Nos. 81-1761/62/63 (1st Cir. September 25, 1981).

of every other court which has wrestled with these issues.

The background of this case and its far-reaching implications upon the administration of justice in the federal courts have been described fully in the Petitions in *Forty-Eight* and *Porter*, and in INA's and Hartford's Petitions in No. 81-1012 and No. 81-1197 in the case at bar, and will not be repeated here. On June 16, 1978, Keene Corporation initiated this declaratory judgment action against four insurance carriers [4] which had issued it general liability insurance, *seriatim*, from 1961 through 1980. Those carriers and the dates they insured Keene are:

INA—December 31, 1961-August 23, 1968
Aetna—August 23, 1968-August 23, 1971
Hartford—August 23, 1971-October 1, 1974
Liberty—October 1, 1974-October 1, 1980 [5]

At the time of its brief in the court below, Keene had been sued in more than 6,000 underlying asbestos product liability cases. Keene sought from the district court a determination as to which of its insurers was responsible

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[4] Keene also named a fifth carrier, Pennsylvania Manufacturers' Association Insurance Company ("PMA"), as a defendant in the district court, alleging that PMA had issued liability insurance to Keene from 1948 to 1961. The district court granted summary judgment dismissing the action as to PMA, however, because Keene could not prove that it had purchased such product liability coverage. That dismissal was affirmed by the court of appeals in a separate appeal, No. 81-1245 (D.C. Cir. October 1, 1981).

[5] Some of the insurers issued their policies specifically to Keene Corporation, and some to asbestos insulation manufacturers which were acquired by Keene Corporation. For present purposes Liberty refers to both classes of companies simply as "Keene."

In addition, Liberty issued a policy to Keene Corporation from August 23, 1967 through August 23, 1968. The District of Columbia Circuit held that there was a factual issue which required trial, however, as to whether this policy had any application to the asbestos product liability actions here in issue. Opinion, INA App. at 35a.

for defending Keene and for paying settlements and judgments in these actions. Jurisdiction in the district court was based on diversity of citizenship, 28 U.S.C. § 1332.

The general liability insurance policies which Liberty issued to Keene were standard form printed policies, and have been used throughout the United States by insurance carriers for many years. The policies are identical to those construed in *Forty-Eight*, *Porter*, and *Eagle-Picher*, notwithstanding the wildly divergent readings which the courts have given them.

Liberty and several of the other insurers issued "occurrence" policies to Keene. These apply to "accidents" (i.e., sudden, traumatic events) and to "continuous or repeated exposure to conditions, which results in **Bodily Injury or Property Damage** . . ."[6] Liberty Policy, Joint App. I at 73.[7] **"Bodily Injury"** is defined to include "bodily injury, sickness or disease." *Id.* Each policy which the insured ever purchased, however, does not cover *any* "bodily injury, sickness or disease," although that is almost what the court of appeals has held. Rather, coverage extends to injury or disease "which occurs during the policy period." *Id.*

In the thousands of underlying actions insulation workers and shipbuilders have sought recovery for lung diseases allegedly contracted after a lifetime of working

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[6] Words in boldface type appear as such in the policies, and such terms are specifically defined in the policies.

[7] References to Joint App. are to the Joint Appendix in the court of appeals proceedings. The policy language quoted at page 5 of INA's Petition is slightly different, inasmuch as it provides coverage as to "bodily injury, sickness or disease . . . which results during the policy period." This difference in wording is attributable to the different dates on which INA and Liberty issued their standard form policies to Keene. No one has contended, however, that such minor differences in wording are pertinent to the present issue, and both the court below, Opinion, INA App. at 6a, and the Sixth Circuit in *Forty-Eight*, 633 F.2d at 1215-16, held that they are not.

with asbestos-containing insulation products made by Keene and other manufacturers. These diseases are asbestosis (a non-malignant fibrotic disease characterized by scarring of the lungs), bronchogenic carcinoma (lung cancer), and mesothelioma (cancer of the cells which line the chest cavity). The diseases do not appear in those who contract them until many years after the initial inhalation of asbestos fibers. Opinion, INA App. at 5a, n.3, and at 10a, n.9.

Liberty and several other parties argued below that asbestosis and cancer "occur," as most people would understand the term, when they manifest themselves by signs or symptoms that indicate to the claimant or his physician that a departure from good health has taken place. This common sense interpretation has become known as the manifestation theory. It is supported by the state court decisions which have considered when disease occurs, and was followed by the district court in *Eagle-Picher*.

Hartford [8] advanced what is now called the exposure theory. This holds that even though asbestosis and cancer are diseases, each involves "injury" to the cells of the lung, which occurs each time asbestos fibers are inhaled, years before any disease manifests itself.[9] Under this

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[8] And also Keene, until it attempted to overhaul its theory shortly before the trial in the district court. Hartford describes the procedural twists by which Keene arrived at its last minute theory. Hartford Petition in No. 81-1197 at 10-13. That the court of appeals rejected all prior decisions in this area to adopt Keene's theory is startling enough. That it managed to do so without "rely[ing] on any legal or factual aspect of Keene's argument," is a remarkable tribute to the District of Columbia Circuit's ingenuity. *See* Order of December 21, 1981 amending the court of appeals opinion, *infra* at Appendix A.

[9] If, indeed, it ever does. Most people who inhale asbestos fibers, and thus experience this cellular "injury," never become ill. "[O]ver 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis." *Eagle-Picher*, 523 F. Supp. at 115.

interpretation, all of the carriers who insured a manufacturer during the many years a claimant was exposed to its products are proportionately responsible for each claim against the insured, based upon the number of years they were "on the risk" relative to the number of years the claimant was exposed to asbestos. Similarly, if the manufacturer was uninsured during part of the exposure period, it is proportionately liable under the same formula. This theory was adopted by the Sixth and Fifth Circuits in *Forty-Eight* and *Porter*, and by the district court below.

The District of Columbia Circuit rejected each of these interpretations, however. Instead, it created a wholly new and amalgamated interpretation composed of bits and pieces of each, together with some additional holdings of its own invention. In doing so it has thrust the law in this important area a giant step backward and has injected chaos where hitherto there was only confusion and uncertainty.

B. THE DECISION BELOW AND THE CONFLICT IN THE FEDERAL DECISIONS

Although the above questions seem straightforward enough, they have provoked a hornets nest of contradictory opinions from the federal courts that have considered them over the last year. The inabiilty of the federal courts to agree upon the duties and rights of insurers and insureds in the thousands of underlying cases threatens to further confuse and delay what is already "the largest, and potentially most costly, block of product liability litigation ever to confront American industry." [10]

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[10] "Asbestos Injury Suits Mount, With Broad Business Impact," *New York Times*, July 3, 1981, at 1.

The issue relates to more than asbestos moreover. The same arguments which underlie the exposure approach in the asbestos context are now being made with respect to such diverse pharmaceuticals as oral contraceptives, DES, and other drugs, and with respect to the Agent Orange multi-district litigation pending in

Throughout its opinion in *Forty-Eight*, the Sixth Circuit acknowledged that the traditional manifestation interpretation makes as much sense with respect to asbestos-related diseases as to others. "We concede that appellants have a good argument . . . . [T]here are solid arguments to support the manifestation theory. . . . These cases certainly appear to provide support for the manifestation theory." 633 F.2d at 1218, 1219, 1221. Nonetheless, that court felt itself "bound to broadly construe the insurance policies to promote coverage," and adopted the exposure interpretation in order to "maximize" coverage for the insured. 633 F.2d at 1219. The Sixth Circuit thus adopted the exposure theory and pro-rated liability among the parties according to how long each was at risk during the exposure period.[11]

In *Eagle-Picher*, on the other hand, the United States District Court for the District of Massachusetts expressly rejected *Forty-Eight* and *Porter*, and adhered to the traditional manifestation interpretation. The *Eagle-Picher* court held that the terms "injury" and "disease" must be construed according to their ordinary, everyday meaning. 523 F. Supp. at 115-6. The court also found that the argument that each inhalation of asbestos fibers

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the Eastern District of New York. *See* "Suits That Are Searing Asbestos," *Business Week*, April 13, 1981, at 166, 169:

> . . . Since illnesses caused by asbestos, such as cancers of the lung, chest, and abdomen, are "latent," typically appearing 10-20 years after exposure, the potential damages could be staggering.
>
> Even more troublesome, some experts believe that asbestos litigation represents just the initial onslaught of occupational —and environmental—related disease lawsuits that will deluge the courts in coming years. . . . New legal remedies in the asbestos area will almost certainly be applied in cases involving radiation, hazardous waste dumping, DES, Agent Orange, and a host of other toxic substances.

[11] In *Porter* the Fifth Circuit adopted the "reasoning and result" of the Sixth Circuit without further elaboration. 641 F.2d at 1145.

produces "bodily injury" within the contemplation of the policies gives those words "a hypertechnical definition" which no one could reasonably have anticipated when the agreements were entered into years in the past. *Id.* at 116-7. This is particularly true because the exposure approach rests upon medical research "on the cutting edge of one area of the developing science in this field," research which has taken place "only within the last five to eight years." *Id.* at 116, n.6. The court correctly noted that the Sixth Circuit's refusal in *Forty-Eight* to follow the well-established precedents supporting the manifestation interpretation "appears to rest primarily on considerations of policy and result." *Id.* at 117, n.9.

Although these cases would appear to set the bounds for determining when injury or disease occurs in the context of asbestos-related lung diseases, the District of Columbia Circuit managed to break new ground with its opinion below. In the process it not only repeated the errors which Liberty, INA, and Aetna pointed out in their Certiorari Petitioners in *Forty-Eight* and *Porter*, but also committed a catalog of new errors.

With remarkable analytical catholicity the court below indiscriminately borrowed an idea here and an idea there, even from mutually inconsistent theories, as follows:

1. It held that the manifestation theory must continue to be followed with asbestos diseases just as with others, "if the purpose of the policies is not to be undercut. . . ." Opinion, INA App. at 20a.

2. In addition, however, it held that each inhalation of asbestos fibers must also be deemed an "injury" so that exposure also triggers coverage. The circular reason for this conclusion was that if only manifestation triggers coverage, it "would deprive Keene of the protection it purchased when it entered into the insurance contracts. We, therefore, reject the manifestation theory

as presented by INA, Aetna and Liberty because it does not allow exposure, as well as manifestation to trigger insurance coverage." Opinion, INA App. at 22a.

3. Still not satisfied that both manifestation *and* exposure create coverage, however, the court noted that inhaled asbestos fibers may remain within the lung, and in this sense the individual may be "exposed" to them for the rest of his life. The court termed this phenomenon "exposure in residence," and having given it a name, held that it too must trigger coverage. The reason: "Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage." Opinion, INA App. at 22a.

4. Finally, the court parted company with the district court below and the *Forty-Eight* court, and held that the manufacturer was *fully* covered in each underlying case by *any* policy in effect at any time during the exposure, exposure in residence, or manifestation periods. Whether that coverage was maintained for thirty years or one month would make no difference. Judge Wald dissented from this portion of the court's ruling.

REASONS THE WRIT SHOULD BE GRANTED

As in *Forty-Eight*, *Porter*, and *Eagle-Picher*, the federal courts have jurisdiction in this case by virtue of diversity of citizenship. Like those courts, therefore, the court below was obliged to determine, and then apply, the substantive law in effect in the various states in which the insurance contracts were entered into. Whatever shortcomings attended its efforts to do so, the Sixth Circuit recognized as much in *Forty-Eight* when it stated that its role was to determine how the highest courts of New Jersey and Illinois (the states in issue there) would resolve the questions presented. 633 F.2d at 1219.

The decision below is unlike that in *Forty-Eight* in this regard. The District of Columbia Circuit made no effort whatever to determine, much less reconcile with its unprecedented opinion, the legal rules announced in the states whose law is germane to this litigation. Its failure to make that effort has resulted in a free-wheeling pastiche of newly proclaimed insurance law concepts directly at odds with those which have been established in the pertinent states.

The District of Columbia Circuit explained its lack of concern for state decisional precedent in these words:

> We find it unnecessary, however, to reach the issue of the applicable state law. The district court did not address the issue, *nor did any of the parties raise the issue.* This omission is apparently due to the fact that the potentially applicable state laws do not differ from one another.

Opinion, INA App. at 10a, n.10 (emphasis added). The italicized statement is difficult to fathom, for in its brief below Liberty raised precisely the issue which the court refused to consider:

> Because the policies between Liberty and Keene were executed in New York and are governed by the law of that state, a recent New York state court decision adopting a manifestation interpretation is particularly instructive.[12]

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[12] The decision referred to is *American Motorists Insurance Co. v. E. R. Squibb & Sons, Inc.*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978), discussed below at page 20.

The District of Columbia Circuit rationalized its lack of concern for the decisional law of New York by concluding that there was only a "false conflict" among the laws of the potentially involved states, so that "There is thus no conflict of laws." Opinion INA App. at 11a, n.10. On the strength of this observation the court evidently believed that it could write on a clean slate in molding its own theory as to how the insurance policies should be construed, without recourse to decisions from New York or any of the other five states potentially interested in the insurance transactions. Indeed, the court below cited only three New York cases in its opinion, *Squibb, Reiser v. Metropolitan Life Insurance Co.*, 262

A. THE COURT OF APPEALS COMPLETELY DISREGARDED ITS OBLIGATIONS UNDER *ERIE* TO CONFORM ITS OPINION TO INSURANCE LAW PRINCIPLES THAT HAVE LONG BEEN WELL ESTABLISHED UNDER THE GOVERNING STATE LAW.

1. *The Court Of Appeals Improperly Reversed The Burden Of Proof.*

The principal argument made in Liberty's Petition in *Forty-Eight*, No. 81-199, was that the Sixth Circuit impermissibly "reversed" the burden of proving the facts which establish coverage, which state law clearly placed on the insured. Although the District of Columbia Circuit expressly rejected most of the Sixth Circuit's reasoning, it unfortunately followed the latter court on this

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A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd mem.*, 289 N.Y. 561, 43 N.E.2d 534 (1942) (discussed below at page 22), and *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930), and it did not follow any of them.

Before a court can hold that a choice of law question presents a false conflict, it must determine specifically what the law in the relevant states is with respect to the question in dispute. Only if that law is the same is there a false conflict, making it unnecessary to decide which law governs. Here, however, the court made no such analysis. Instead, it brushed aside such an endeavor as "unnecessary" since "basic principles" in all of the potentially affected jurisdictions were "the same." In refusing to deal meaningfully with the controlilng state decisions, the court reduced the entire body of insurance law of six states to an amorphous generality, that insurance policies have a "dominant purpose of indemnity," or insureds are entitled to "certainty" against all liability. Opinion, INA App. at 12a. This Court will permit a mischieveous retrenchment of *Erie* if it permits a federal diversity court to ignore applicable state rules of decision by reducing them to such meaningless generality that it is "unnecessary" to consider them. Indeed, for the court below to apply the law of a state other than New York to the contracts between Liberty and Keene would deprive Liberty of due process, for other states have no substantial contact with that contractual relationship. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Home Insurance Co. v. Dick*, 281 U.S. 397, 408 (1930).

issue. Ironically, the court below, like the Sixth Circuit, made that ruling in a footnote without citing authority or in any way justifying its reversal of state law in a diversity case.

> We recognize that the insured generally bears the burden of proving coverage. The injuries at issue in these cases, however, are unique and traditional procedural rules cannot be allowed to defeat Keene's nor its insurers' substantive rights under the policies. Reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation.

Opinion, INA App. at 34, n.42.

The court of appeals thus ignored this Court's decisions that "[U]nder the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive'," not merely procedural. *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959). *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939). *See also, Fireman's Fund Insurance Co. v. Videfreeze Corp.*, 540 F.2d 1176 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) (Error to shift burden of proof to insurer from "where it would ordinarily rest . . . —on the insureds").[13]

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[13] Liberty and other parties filed petitions for rehearing and suggestions for rehearing *en banc* in the court below in which Liberty raised this burden of proof issue. On November 19, 1981 the Dsitrict of Columbia Circuit denied the rehearing petitions. Nevertheless, on December 21, 1981 in an order it designated as "*sua sponte*," the court amended Judge Bazelon's opinion by adding several new paragraphs thereto. (A copy of the court's December 21, 1981 amendment to the opinion is reprinted as Appendix A to this Petition.)

On the burden of proof issue the court below added the following to its footnote 42. "We recognize that burdens of proof are matters of state law. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959). We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case." The court

Liberty has dealt with this principle in detail in its Petition in *Forty-Eight*, and those arguments will not be repeated here. We note, however, that New York, like New Jersey and Illinois (whose law was in issue in *Forty-Eight*), has consistently followed the general rule that in a coverage dispute the burden of proving the facts necessary to establish coverage rests on the insured, not the insurer. Indeed, the New York courts have applied this rule not only in cases involving liability insurance,[14] but also in those involving accident insurance,[15]

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therefore recognized that Judge Bazelon's characterization of the burden of proof rule as procedural was erroneous. Nevertheless, the court left unchanged his reversal of the burden of proof without citing any authority, or identifying in what manner this insurance case differs from the many stating the usual rule. In doing so, the court completely disregarded its *Erie* obligations.

[14] *Lavine v. Indemnity Insurance Co.*, 260 N.Y. 399, 410, 183 N.E. 897, 900 (1933) ("The burden of proof rested upon the plaintiff to establish that the policy covered."); *Bogardus v. United States Fidelity & Guaranty Co.*, 269 A.D. 615, 58 N.Y.S.2d 217, 222 (1945) ("[T]he burden of proof to show a cause of action under the coverage of the policy is on the plaintiff. . . ."); *Carles v. Travelers Insurance Co.*, 238 A.D. 43, 263 N.Y.S. 29, 31 (1933), *rehearing denied*, 239 A.D. 814, 263 N.Y.S. 976 (1933) (Where the policy did not apply to injuries caused by an elevator being operated by a person under the lawful age for elevator operators, "the burden was upon this plaintiff both of pleading and of proving that the elevator at the time of the acicdent was being operated by a person of legal age.")

[15] *Whitlatch v. Fidelity & Casualty Co.*, 149 N.Y. 45, 51, 43 N.E. 405 (1896); *Plotkin v. Disability & Casualty Inter-Insurance Exchange*, 27 A.D.2d 719, 277 N.Y.S.2d 464, 465 (1967) ("The issue is whether Plotkin died an accidental death, with the burden on plaintiff to prove death within the coverage. . . ."); *Regan v. National Postal Transport Association*, 53 Misc. 2d 901, 280 N.Y.S.2d 319, 327 (1967) ("[T]he plaintiff in an action upon an accident policy . . . must, by the fair preponderance of the credible evidence, show not only that the insured died but that the death, or the injuries which causes [sic] it, was of the kind insured against by the policy. . . .")

casualty insurance,[16] life insurance,[17] marine insurance,[18] burglary insurance,[19] fidelity insurance,[20] and credit insurance,[21] so the court below had to sweep a lot of decisions under the rug to declare that they "provide no authority for this case." If this Court's rulings in *Dick*, *Palmer*, and *Cities Service* are to continue to have any meaning at all, the refusal of the court below to follow New York law merely by labelling asbestos cases "different" cannot be permitted to stand.[22]

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[16] *Hallas v. North River Insurance Co. of New York*, 279 A.D. 15, 107 N.Y.S.2d 359, 360 (1951), *aff'd mem.*, 304 N.Y. 671, 107 N.E. 2d 592 (1952) ("Plaintiff, therefore, had the burden under the policies of showing the extent of any covered loss occasioned by fire as distinguished from any excluded loss caused by the explosion.")

[17] *Barlow v. Prudential Insurance Co. of America*, 17 Misc. 2d 864, 187 N.Y.S.2d 231, 232 (1959) ("While death in an action on an insurance policy may be established by proof of disappearance under the circumstances that indicate death rather than concealment, the burden of proof in such situation is at all times upon the plaintiff.")

[18] *Berwind v. Greenwich Insurance Co.*, 114 N.Y. 231, 21 N.E. 151 (1889), *reargument denied*, 21 N.E. 1119 (1189); *Green v. Globe & Rutgers Fire Insurance Co.*, 200 A.D. 343, 192 N.Y.S. 770, 771 (1922) ("The appellant correctly states the law that the burden of proof is upon the plaintiff to prove that the loss occurred as the result of a peril insured against. . . .")

[19] *United Sponging Co. v. Preferred Accident Insurance Co.*, 97 Misc. 396, 161 N.Y.S. 309, 311 (1916), *aff'd mem.*, 165 N.Y.S. 1116 (A.D. 1917).

[20] *Re Penna's Estate*, 160 Misc. 525, 290 N.Y.S. 200, 203 (1936), *rev'd on other grounds*, 250 A.D. 719, 293 N.Y.S. 73, *aff'd sub nom. In re National City Bank*, 274 N.Y. 600, 10 N.E.2d 571 (1937).

[21] *Goodfriend v. American Credit Indemnity Co.*, 217 A.D. 635, 217 (N.Y.S. 162, 165, *aff'd*, 244 N.Y. 546, 155 N.E. 891 (1926) (burden upon plaintiff insured to prove that bankrupt was in sound financial condition at time of plaintiff's transaction with him).

[22] In *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), this Court identified the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the

2. *The Court Impermissibly Refused To Follow The "Ordinary Meaning" Rule Followed By The New York Courts.*

Since Judge Cardozo's admonition that the court's point of view in interpreting an insurance contract "must be that of the average man," *Lewis v. Ocean Accident & Guaranty Co.*, 224 N.Y. 18, 21, 120 N.E. 56, 57 (1918), the courts of New York have consistently agreed that words used in insurance policies should be understood as they are commonly and ordinarily used. "[T]erms are to be taken and understood in their plain, ordinary, and proper sense." *Johnson v. Travelers Insurance Co.*, 269 N.Y. 401, 199 N.E. 637, 640 (1936). *See also State Farm Mutual Automobile Insurance Co. v. Westlake*, 35 NY.2d 587, 364 N.Y.S.2d 482, 485 (1974). Policy language must be interpreted "in the light of the average

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laws." State law is to be followed when "the application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." *Id.* at n.9. The circuit court's refusal to apply state law on the burden of proof issue will undoubtedly induce forum-shopping because an insured bringing a coverage action in a district court in the Fifth, Sixth and District of Columbia Circuits has a substantial advantage over a similar plaintiff before a state trial court, which is still bound by the decisions of that state's highest court.

The second Erie interest requires that "the accident of diversity" may not "disturb equal administration of justice in coordinate state and federal courts sitting side-by-side." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), quoted with approval in *Day and Zimerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam). Under the decision below, *Forty-Eight*, and *Porter*, federal courts in three circuits must apply the opposite rule on a potentially outcome-determinative issue as the trial courts of the state in which they sit. "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day and Zimmerman, Inc. v. Challoner, supra*, at 4.

man's understanding of plain language or common speech, and not the understanding of the scientist or savant." *Lee v. Guardian Life of America*, 46 N.Y.S.2d 241, 245 (1944), *aff'd*, 267 A.D. 985, 48 N.Y.S.2d 800, *appeal denied*, 268 A.D. 849, 50 N.Y.S.2d 674 (1944).

Courts called upon to interpret what "injury" and "disease" mean in the insurance context have determined that in common speech the two are not synonomous.

> The words "bodily injury" are commonly and ordinarily used to designate an injury caused by external violence, and they are not used to indicate disease. We do not speak of sickness as an accident or injury.

Burns v. Employers' Liability Assurance Corp., 134 Ohio St. 222, 16 N.E.2d 316, 321 (1938). *See also Lincoln National Life Insurance Co. v. Erickson*, 42 F.2d 997, 1001 (8th Cir. 1930) ("The distinction thus drawn is not a strained one, but is such as would occur to the mind of the ordinary layman."); *Wright v. American Home Assurance Co.*, 488 F.2d 361, 364 (10th Cir. 1973).

The *Eagle-Picher* court recognized that "it is a basic tenet of insurance law that unambigous contract terms are to be given their common, popular, and ordinary meaning." 523 F. Supp. at 115-6 (citing, *inter alia*, *Erickson*, *supra*). Applying this rule in the asbestos context, the court rejected as "hypertechnical" the exposure construction of the policies under which "injury" during the policy period would refer to "the earliest subclinical cellular damages . . . [rather than] the time when the individual has clinically evident disease." *Id.* at 116-117.

If a claimant was exposed to asbestos in 1950 and contracted cancer in 1980,[23] most people would surely say

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[23] Although asbestosis generally occurs only after years of continuous and excessive exposure to asbestos dust, the above fact pattern is not unusual with respect to lung cancer and mesothelioma. See, for example, Dr. Chester's testimony concerning a

that his disease occurred in 1980, as the words are "commonly and ordinarily used." The court below evidently agreed, for it held that a manifestation interpetation had to be preserved, at least in part, if the purpose of the policies was not to be "undercut." Opinion, INA App. at 20a. Nevertheless, the court also held that injury or disease "occurred" in 1950, and continued to "occur" during the thirty years between the exposure and the development of cancer. Judge Bazelon's opinion made no pretense that this elastic reading of the policy terms necessarily reflected the way they ordinarily would be understood. Instead, the court below brushed aside the "ordinary" meaning of the contracts as immaterial.

> [T]he fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies.

Opinion, INA App. at 15a.

That this is not the law of New York—nor, as the *Eagle-Picher* decision reminds us, anywhere else—did not perturb the court of appeals, but it provides one more glaring reflection of the need for this Court to emphasize to the lower federal courts wrestling with asbestos coverage issues their obligation under *Erie* to follow the appropriate state law, "not to limit, modify, or repeal state doctrine" whenever it does not square with the result which the federal court wishes to reach. *Rehm v. Interstate Motor Freight System*, 333 F.2d 154, 157 (6th Cir. 1943). The District of Columbia Circuit, sitting as an *Erie* court, cannot do what the highest court of New York recognized as improper.

> This court may not make or vary the contract of insurance to accomplish its notions of abstract jus-

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patient of his who worked on a navy vessel for two months during World War II while it was being refitted, worked for 33 years thereafter as an accountant, and suddenly contracted mesothelioma in 1978, dying within a year. VII Joint App. at 2738-44.

> tice or moral obligation, since "[e]quitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against."

Breed v. Insurance Co. of North America, 46 N.Y.2d 351, 356, 385 N.E.2d 1280, 413 N.Y.S.2d 352, 355 (1978).

3. *The Court Improperly Ignored New York Precedent Which Directly Supports The Manifestation Position.*

Because INA carefully addresses the point in its Petition in No. 81-1012, we note only briefly our agreement with INA's observation that in insurance cases the generally applied state law is the manifestation rule. It is not the exposure rule, and it is assuredly not the analytical boullabaisse created by the District of Columbia Circuit here. Manifestation is also the rule which the New York courts have followed, notwithstanding the court of appeals' belief that it was "unnecessary . . . to reach the issue of the applicable state law." Opinion, INA App. at 10a, n.10.

A long-developing medical disability similar to those in the underlying actions here was considered in *Reiser v. Metropolitan Life Insurance Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941) *aff'd mem.*, 289 N.Y. 561, 43 N.E. 2d 534 (1942). There the claimant suffered from calcium deposits attributable to treatment of club feet during his infancy. The calcium deposits had remained dormant and undiscovered for almost forty years, and had caused no difficulty for the claimant until they suddenly flared up during the policy periods, seriously disabling him. In determining whether "bodily injury or disease" had "occurred" within the meaning of a health insurance policy, the New York court said:

> A disease does not occur or originate within the meaning of the policy until it becomes a disease in the general acceptation of that term; a bodily injury does not occur nor originate within such meaning, at least until it reveals itself.

28 N.Y.S.2d at 286 (citing and applying the rule of interpretation in *Lewis v. Ocean Accident & Guarantee Corp.*, *supra*). Another New York court said substantially the same thing in *Wenger v. Mutual Benefit Health & Accident Association*, 203 N.Y.S.2d 946, 947 (1960): "A person is not regarded as being sick if he performs his usual occupation and engages in his usual activities."

Even closer to home is *American Motorists Insurance Co. v. E. R. Squibb & Sons Inc.*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978), a declaratory judgment action which presented exactly the question posed here, though hardly with the same result. That court interpreted a liability insurance policy which even the court below admitted was "similar in all relevant respects to the policies we have before us." Opinion, INA App. at 19a. *Squibb* involved a drug known as DES, to which the three claimants were exposed, *in utero*, in 1952, 1953, and 1961, respectively. They sued Squibb for cervical cancers which weren't discovered until 1970, 1971, and 1975. The New York court squarely held that the manifestation of the cancers, not the exposures to the drug, triggered insurance coverage.

The District of Columbia Circuit could hardly ignore *Squibb*, but it did something almost as bad. It misstated what the New York court said, and then it rationalized that its own holding conformed with the state court's when it clearly did not. The court below said that in *Squibb* the "court did not have to determine the liability of an insurer that was on the risk prior to the diseases' manifestation," so that the new York court's application of the manifestation interpretation was not inconsistent with Judge Bazelon's manifestation-plus-exposure-plus-exposure-in-residence theory. Opinion, INA App. at 20a. This end run around the state decision completely ignores what the New York court said, however:

> A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but upon

> the result. It would be a *strained interpretation* to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the *result* which is keyed to the policy period, and not the accident or exposure.

406 N.Y.S.2d at 659-60 (first emphasis added). The state court could not have more clearly rejected the "strained" exposure-based rationale adopted by the District of Columbia Circuit here.[24]

B. EVEN IF EXPOSURE IS THE TRIGGER OF COVERAGE, THE COURT BELOW ERRED IN REFUSING TO HOLD THAT THE INSURED IS RESPONSIBLE FOR INJURIES ATTRIBUTABLE TO EXPOSURES WHEN IT HAD NO INSURANCE.

Because the policies provide coverage only for injury or disease which occurs during the policy period, even the District of Columbia Circuit acknowledged that this case could be approached only by reference to that language. "In the language of the policies, the question is when did 'injury' occur?" Opinion, INA App. at 13a. Having made that observation, however, the court ignored it altogether. In doing so, it created a square conflict in the circuits with respect to an issue which is central

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[24] We recognize that under *King v. Order of Travelers*, 333 U.S. 153 (1948), a federal diversity court is not necessarily controlled by a lower state court decision, where the highest court of the state has not addressed the issue in question. This Court has also held, however, that such state trial court decisions cannot be altogether disregarded. Rather, they must be studied and "proper regard" must be given to them, in the federal court's effort to understand how the highest courts of the state would rule on the issue. *Commissioner v. Estate of Bosch*, 387 U.S. 450, 464 (1967). The rule is that the decisions of lower state courts must be adhered to in a diversity case unless the diversity court "is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). No matter how the criterion is articulated, it is clear that the District of Columbia Circuit's disregard for what the New York court said in *Squibb* does not measure up to its *Erie* responsibility.

to the responsibilities which the parties have in the defense of the thousands of underlying asbestos actions.[25]

As the above language shows, if any exposure-based interpretation of the policies were to stand, it could be upon one basis only. That is that each exposure to asbestos results in some bodily reaction which should be designated as "injury," thus triggering insurance coverage. There is simply no other reasoning which could support a deviation from the traditional manifestation interpretation, for if there is no "injury" which "occurs during the policy period," there is no coverage.

What this means, however, is that if a claimant was exposed to a manufacturer's products at a time when that manufacturer had no insurance, the "injuries" attributable to those exposures are the manufacturer's responsibility. Any other result gives the insured a windfall by providing it coverage, *gratis*, for injuries it inflicted at a time when it had not purchased insurance. The Sixth Circuit categorically rejected this result in *Forty-Eight*, although it was "vehemently" urged by the insured with respect to defense costs.

> The duty to defend arises solely under contract. An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share for the defense of the non-covered risk.

Forty-Eight, 633 F.2d at 1224-25.

Judge Wald accordingly dissented with respect to this portion of the court's holding, because it makes no sense

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[25] As discussed at page 28 below, the District of Columbia Circuit's departure from the holding in *Forty-Eight* did not rest on a difference in the state law being applied. (Indeed, how could it since the court below ignored state law anyway?) Rather, both courts applied the same general principles, notwithstanding their complete disagreement as to where those principles led.

that "an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period." Opinion, INA App. at 44a (Wald, J.). As Judge Wald correctly stated, the court's holding on this point flatly contradicts the "very notion of 'injury' adopted by the panel." It also gives Keene an unjustifiable windfall, because "If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continuously purchased insurance." *Id.* at 45a.

Judge Bazelon's opinion attempted to sidestep Judge Wald's lucid criticism on this point with some of the most convoluted language in the decision.

> Although we have defined the term "injury," we have done so only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety. . . .[26] [Judge Wald's reasoning] that the insurers are not obligated to indemnify Keene in full contradicts the first and foremost aspect of our decision—our holding that each policy provides Keene with the right to be free of liability for asbestos-related disease.

Opinion, INA App. at 26a-27a. Elsewhere the court below ruled that it was reasonable to hold each insurer responsible for the entirety of an underlying claim, whether it was on the risk for one day or twenty years, on the basis that, "Nor do the policies provide that 'injury' must occur *entirely* during the policy period for full indemnity to be provided." Opinion, INA App.

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[26] Earlier the court described "when did 'injury' occur" as "the question" presented by this action. Opinion, INA App. at 13a. Within a few pages, however, it was reduced to only "an incidental aspect" of the issue. Apparently it did not support the result which the court intended to reach as "a logically prior determination."

at 28. The court described this reasoning as not "too great a leap of logic." *Id.* at 29, n.34.

We will forego comment on the propriety of deciding one of the most important issues of commercial law to face the federal judicial system by leaps of logic, great or otherwise. It is surely in order to point out, however, that the policies *do* provide precisely what the court below said they do not. They provide coverage, that is, for injury or disease "which occurs during the policy period." Are there any words by which the insurers could more clearly have stated in their agreements that injuries which occurred outside the policy period would *not* be covered?

C. IF THE OPINION BELOW IS PERMITTED TO STAND, IT WILL GEOMETRICALLY INCREASE THE CONFUSION, DELAY, AND EXPENSE WHICH ALREADY CHARACTERIZE THE ASBESTOS LITIGATION IMBROGLIO.

As mentioned in the Petitions in *Forty-Eight*, in most of the underlying actions the claimants sue not just one but several asbestos manufacturers, usually from 15 to 20. Indeed, it is not at all uncommon for Forty-Eight Insulations, Eagle-Picher Industries and Keene all to be named as defendants in the same suit. Liberty, like the other carriers, also insures several other companies which appear with frequency in the underlying litigation.

The confusion already created by the holding in *Forty-Eight* that all of an insured's carriers are responsible for every underlying case, on a proportionate basis, will become intractable chaos if the opinion below stands. That is, in any given underlying case, even though the contract language between the parties is identical, Liberty will be required (1) to handle the case as to Eagle-Picher on the normal manifestation basis, (2) to handle the case as to Forty-Eight Insulations on an exposure basis, sharing proportionate responsibility together with Forty-Eight and its five other carriers, and

(3) to handle the case by itself as to Keene, if Keene so demands,[27] subject to allocating costs against Keene's other carriers in a separate proceeding. And what of Liberty's other insureds? As to them, Liberty may or may not owe a defense at all. It may or may not be required to participate in the defense, but together with the insured's other carriers. It may or may not be required to deal with the insured as a contributing member of the defense team in the underlying action. It may or may not be required to defend the case by itself, and then pursue a follow-up action against its insured's other carriers.

To make matters worse, the answers to the above dilemmas may vary from circuit to circuit, as each lower federal court, heedless of state law, forges its own solutions to the asbestos litigation quagmire. The stakes involved are so enormous that one can predict with near certainty that so long as there is an argument to be made, or a circuit in which to make it, the instant coverage litigation will roll on with no end in sight. The delay and confusion that this juridical extravaganza will produce will serve no one well, but now no company can afford *not* to litigate the coverage issue in any circuit where it has not been authoritatively decided, when

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[27] Judge Bazelon's decision allows Keene to choose on a case by case basis which insurer will defend it. "Of course, only the insurer that Keene selects will defend Keene." Opinion, INA App. at 32a. Once that insurer's policy limits are exhausted, however, Keene can switch to another. "[W]e are not requiring that the company that defends Keene also be the company whose policy limits determine the extent to which Keene may be indemnified." *Id.* at n.38. Thus, under the decision below, even though the policies expressly give the insurer the right to control the defense of any action which it is required to handle for the policyholder, Liberty policy, III Joint App. at 1092, the insurers not "selected" by Keene are permitted no say about the defense of the underlying suit.

the variations among the federal courts' interpretations to date are so great.

Judge Bazelon's opinion, moreover, creates other dilemmas wholly apart from the mere fact that it conflicts with the opinions of the other courts which have ruled on the coverage question. The District of Columbia Circuit agreed with Liberty that the result reached in *Forty-Eight* would turn each underlying suit into "an unwieldy spectacle." Groups of defendants and their insurers would pursue disputes with each other, Opinion, INA App. at 32a, n.38, while the plaintiff watched and the jury lost all comprehension of who was arguing with whom over what. The court below had no effective answer to that problem, however. Its opinion merely attempted to defer the problem in the hope that it would go away.

The District of Columbia Circuit specifically directed that the claimant's underlying action should not be confused or delayed by resolution of the coverage controversy. Instead, Keene should simply point to an insurer and that insurer should handle Keene's defense, by itself. After that, the parties must gird their loins for a second round of litigation to determine how much each insurer should contribute. "As we state below, the factual basis of the insurers' contract obligations may be developed independently of the factual basis of the tort suit." Opinion, INA App. at 32a. The facts determined at the first trial, moreover, will not be binding in the follow-up coverage trial. "Any facts concerning the period of exposure or the point of manifestation that are proved in an underlying tort suit need not be legally dispositive of a dispute among insurers concerning allocation of their liability." Opinion, INA App. at 34a. Under *Forty-Eight* the prospect of more litigation as the parties attempt to figure who owes what in the thousands of un-

derlying cases is a disturbing spectre.[28] The District of Columbia Circuit has made that spectre a virtual certainty.

CONCLUSION

Several parties and *amici curiae* in *Forty-Eight* and *Porter* have acknowledged that in the ordinary diversity case, because the issues are controlled by state law, "conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). The reason that such conflicts are normally of no moment to this Court, of course, is that they are "merely corollary to a permis-

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[28] The burden which the federal courts are suffering under the onslaught of asbestos litigation was commented upon just a month ago by one court of appeals. "This is not the first, nor will it be the last, asbestos case confronting this Court. At recent count, there were over 3,000 asbestos plaintiffs in the Eastern District of Texas alone. . . ." *Migues v. Fibreboard Corporation, et al.*, No. 80-1994 (5th Cir. December 7, 1981). In *Migues*, the Fifth Circuit reversed the district court's unwarranted use of *stare decisis* in holding that asbestos products were unreasonably dangerous as a matter of law. That district court has stated elsewhere that if it cannot expand the traditional application of collateral estoppel and *stare decisis*, asbestos litigation will "slow the Eastern District [of Texas] to a standstill." *Hardy v. Johns-Manville Sales Corporation*, 509 F. Supp. 1353, 1362 (E.D. Tex. 1981).

The problem is not limited to federal courts in Texas. Pleadings in asbestos cases "fill five file cabinets in Room 924 of the McCormack Post Office Building and they represent one of the largest—if not the largest—pending blocks of litigation the U.S. District Court of Massachusetts has ever seen. . . . The backlog of cases is already so great, and the pre-trial hearings so complex, that the consequences for the legal system could be devastating when the suits start coming to trial early next year." *Boston Herald American*, September 13, 1981.

sible difference of opinion in the state courts." *Id.* at 206.

This is not the ordinary diversity case, however, and it does not present the situation referred to in *Ruhlin*. None of the federal courts which has grappled with the asbestos coverage issue has relied upon, or even referred to, any "permissible difference of opinion" in the state rules of decision that apply. To the contrary, in *Porter* the Fifth Circuit adopted, literally without discussion, the "reasoning and result" of *Forty-Eight*, without even touching upon the decisions in Louisiana, whose law supposedly controlled. In *Eagle-Picher*, similarly, the district court said that it made no difference whether the law of Ohio, Illinois, or even England was applied to the issues presented, since the general principles that governed were the same in all jurisdictions. 523 F. Supp. at 116, n.5. As noted previously, the District of Columbia Circuit said the same thing here because "the basic principles governing the interpretation of the insurance policies are the same" in Delaware, New York, Pennsylvania, Connecticut, Massachusetts, and the District of Columbia, the states which might be involved. Opinion, INA App. at 10-11, n.10.

For whatever reasons, all of the asbestos coverage actions decided to date have been handed down by the federal courts. Each of those courts has stated that its decision is based upon the same basic principles. Liberty presently is defending most of the asbestos cases against Keene, together with those against Forty-Eight Insulations, and Eagle-Picher. The asbestos claims against each of these three companies now number approximately 11,000. Altogether, Liberty presently is defending approximately 70,000 asbestos claims on behalf of more than three dozen insureds, and new claims are being filed at a rate of 500 to 600 a month. These claims involve more than 10,000 separate lawsuits. How ironic

it is, therefore, that after the application of the same basic legal principles to exactly the same contract language, Liberty has ben instructed by three federal courts to deal with this ocean of claims in three completely inconsistent fashions.

As Liberty's and INA's Petitions show, there is a well established body of state law which can and should be brought to bear on the questions these coverage actions present. By and large, however, the federal courts have felt free to ignore, or even openly to "reverse," these state rules on the basis that asbestos litigation is "unique." Unless this Court exercises its powers of supervision to define what obligations *Erie* imposes upon the lower federal courts in dealing with the maelstrom of asbestos product liability litigation, further judicial turmoil and delay are guaranteed.

Nothing could prove what is at risk more surely than the idiosyncratic opinion rendered by the District of Columbia Circuit here. That court ruled that it was not bound to give the words of the contracts their ordinary meaning. It ruled that it was not bound to rely upon the medical evidence as to the diseases in question. It stated that it was not obligated to follow state law. It held that it could rule completely in favor of the insured on every conceivable point even though it did not "rely on any legal or factual aspect of Keene's argument." Amended Opinion, App. A. It rejected the reasoning of every other decision reached by the federal courts which have struggled with the coverage question. A denial of certiorari in this extraordinary case, therefore, will signal to other manufacturers and to the insurance industry that they must embark upon still more waves of coverage litigation to determine whether the District of Columbia Circuit's novel views on these points will be followed by the other circuits.

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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January 15, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And Consolidated Case Nos. 81-1180, 81-1181 & 81-1182

Filed Dec. 21, 1981

Before: BAZELON, Senior Circuit Judge, WILKEY and WALD, Circuit Judges

ORDER

IT is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Senior Circuit Judge Bazelon on October 1, 1981, in the above entitled cases is hereby amended as follows:

> Page 13, note 12: At the end of footnote, delete "the reasonable expectations of Keene" and replace with "the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language."

Page 14, note 15: Add, "*See also* p. 22 n.24."

Page 22, note 24: Add, "One district court, however, has adopted the manifestation theory. *See* Eagle-Picher Industries v. Liberty Mut. Ins. Co., Civil Actior No. 78-2739-Z (D. Mass., August 14, 1981)."

Page 23, note 25: Add at end, new paragraph: "Keene did not raise the exposure-in-residence aspect of its argument below. Because we do not rely, however, on any legal or factual aspects of Keene's argument, *see* note 19 *supra*, we are not precluded from deciding that exposure in residence triggers coverage."

Page 34, note 42: Add after second sentence: "We recognize that burdens of proof are matters of state law. Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959). We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case.

PER CURIAM

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Amicus Brief

MOTION FILED
JAN 15 1982

No. 81-1328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF WALBROOK INSURANCE COMPANY, LTD., ET AL. FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF WALBROOK INSURANCE COMPANY, LTD., ET AL. FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.1 of this Court's rules, the following insurance companies in the London insurance market and underwriters at Lloyd's, London, move for leave to file a brief *amici curiae,* bound herewith, in support of the petitioner: Walbrook Insurance Company, Ltd.; Southern American Insurance Company; Mutual Re-Insurance, Ltd.; St. Catherine Insurance Company, Ltd.; London and Edinburgh General Insurance Company, Ltd.; Dominion Insurance Company, Ltd.; Yasuda Fire and Marine Insurance Company (U.K.), Ltd.; Bellefonte Insurance Company; Mentor Insurance Company (U.K.), Ltd.; Assicurazioni Generali London; Stronghold Insurance Company, Ltd.; National Casualty Company of America, Ltd.; Accident and Casualty Insurance Company; Argonaut Northwest Insurance Company; Slater, Walker Insurance Company,

Ltd.; and John Basil Thomas Bird as a representative underwriter representing certain underwriters at Lloyd's, London.

All of the foregoing companies and underwriters support the manifestation interpretation of coverage under the policies of insurance here at issue.* With the permission of this Court, these companies and underwriters previously filed a brief as *amici* in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.* and *Liberty Mutual Insurance Co.* v. *Forty-Eight Insulations, Inc.*, Nos. 81-198, 81-199, *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), and they now seek this Court's leave to file the attached brief addressing the unique problems created by the decision below.** While *amici* have received the consent of certain of the parties to filing the attached brief, respondent Keene Corporation and petitioner in No. 81-1197, Hartford Accident & Indemnity Company, have declined to consent.

As further detailed in the Statement of Interest in the attached brief, the London Market has provided excess insurance coverage for numerous manufacturers of asbestos-containing products, and continues to offer such coverage. The London Market also provides excess insurance for a wide variety of other products liability claims. The amount of such insurance, although not precisely quantifiable, is certainly measured in hundreds of millions of dollars.

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* Other underwriters and companies in London espouse the exposure theory; all underwriters and companies in London are hereafter sometimes referred to together, despite their differences in interpretation, as "the London Market."

** Two other petitions for writs of certiorari have been filed which also seek review of this decision. *Insurance Co. of N. America* v. *Keene Corp.*, No. 81-1012 (U.S. filed Nov. 30, 1981), and *Hartford Accident & Indem. Co.* v. *Keene Corp.*, No. 81-1197 (U.S. filed Dec. 24, 1981).

The Court of Appeals' new interpretation of the primary, first-layer insurance policies will directly affect the point at which primary coverage may be exhausted, and hence the point at which claims may be made on the excess coverages. Moreover, the Court of Appeals' decision, although purportedly based on state law, is in fact a novel formulation of what can only be termed "general state common law,"* applicable in the District of Columbia Circuit and effectively uncorrectable in state court.

The uncertainties created by the Court of Appeals' new rule, which is contrary to settled principles of contract interpretation and choice of law, will have a profound impact on the products liability insurance provided by *amici* at the excess levels. Therefore, for the reasons set forth in this motion and in the statement of interest in their brief, the manifestation underwriters and companies in the London Market respectively request that this motion to file the attached brief be granted.

January 15, 1982

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* *Cf. Erie Railroad* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

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No.

IN THE

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OCTOBER TERM, 1981

LIBERTY MUTUAL INSURANCE COMPANY,
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v.

KEENE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

Amici, underwriters and companies in the London insurance market, provide excess or umbrella insurance coverage for products liability claims. United States insureds are among those to whom such coverage is provided, and asbestos-related claims have been, and are, included within the scope of the afforded coverages. *Amici's* coverages, however, are not limited to asbestos-related claims, but include all other types of products liability claims. As a general matter, these coverages are provided through standard form policies which do not differ significantly in language from the policies at issue in this case.

Amici previously filed, with this Court's permission, a brief urging review of the *Forty-Eight* decision.[1] The consequences of that decision, from *amici's* perspective, were extremely serious. The Court of Appeals' decision in *Keene,* however, increases the difficulties for *amici* exponentially, while at the same time leaving no effective redress except action by this Court.

Quite simply, the Court of Appeals' rule of decision may enormously expand insurers' potential liabilities at all levels, and certainly will increase the uncertainties under which insurers must do business. The Court of Appeals' interpretation will affect the point at which primary coverages are exhausted and excess coverages come into play. The court's linguistic interpretation, moreover, will in all likelihood apply not only to the primary policies which were before it, but also to the excess or umbrella policies like those of the *amici*: courts will properly be reluctant to interpret excess policies in a way inconsistent with an interpretation previously given to substantially the same language in primary policies. Further, as is clear from Judge Wald's concurrence, the Court of Appeals thinks its rationale equally applicable to other long-term disease claims. The scope of coverage at both the primary and the excess levels, therefore, may be profoundly altered by the decision below, not only for asbestos-related claims, but for other products liability claims.

Because interpretation of the insurance contracts at issue in this diversity case is governed by state law, an erroneous decision by one federal court could ordinarily be corrected in another case by the courts of the particular state whose law was at issue. Moreover, conflicts among federal courts of appeals over state law questions could

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[1] *Insurance Co. of N. America* v. *Forty-Eight Insulations, Inc.,* No. 81-198, and *Liberty Mut. Ins. Co.* v. *Forty-Eight Insulations, Inc.,* No. 81-199, *cert. denied,* 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981).

also, eventually, be resolved by state courts, paramount on questions of their own law. In the present instance, however, the Court of Appeals has effectively foreclosed that approach by refusing to determine which state's law controls the instant contracts; rather, it has fashioned a new general state common law of insurance.

In the conduct of its business, and especially given its unique position in the provision of excess insurance coverage, the London Market necessarily relies on consistent application of settled principles of contract interpretation and choice of law. The Court of Appeals' methodology, with its creation of general principles of state law as a basis for departing from particular state precedents, now introduces the possibility of uncorrectable conflicts among the courts of appeals. Such a result promotes the evils of forum shopping and precludes sound risk analysis necessary for the orderly transaction of business by insurers and insureds.

Moreover, this decision involves matters of great public importance. While the case is, in its strictest sense, a dispute between private parties, the magnitude of the questions decided and the number of persons affected pose significant public questions. There are few cases presented to the federal judiciary which have such substantial impact on so many interests, and which also have such a fundamental effect on the shape of the law itself.

SUMMARY OF ARGUMENT

When a federal court of appeals errs in interpreting federal law, correction is available in this Court. When a federal court of appeals errs in interpreting state law, correction may in theory be provided by this Court, but in practice is usually obtained from the courts of the state

itself. Such correction is only possible, however, if the federal court identifies with precision which state's law it purports to apply. Failure to do so effectively destroys any opportunity for correction or redress, and when the results under the law of at least one of the affected states would be to the contrary, requires review by this Court. *See infra* pp. 5-9.

Second, the Court of Appeals' disregard of specific precedents from the states most concerned with these contracts, and its reliance instead on "basic principles" of contract law common to many states, is contrary to the primary obligation of a federal court in diversity to act as a court of the state in which it sits. By its formulation of a new general state common law, the Court of Appeals has also created uncorrectable conflicts among the federal courts of appeals over interpretation of these basic principles. The result not only defeats the policy of uniform treatment of litigants in state and federal courts, but also leads to forum shopping among the federal courts. This creation of general state common law is an unprecedented and unjustified expansion of federal judicial authority in diversity cases, and it requires this Court's supervision. *See infra* pp. 9-13.

Finally, the Court of Appeals' decision to select and apply its own novel formulation of general common law to these insurance contracts is constitutionally defective. The due process clause of the Fourteenth Amendment to the Constitution requires sufficient and substantial contacts with the state whose law is chosen and applied. In this instance, however, the Court of Appeals chose to apply general state common law rather than the law of those states with substantial contacts to these insurance contracts. Such a constitutionally deficient method of decision requires correction before it is relied upon in other progressive disease cases. *See infra* pp. 13-15.

ARGUMENT

I. By Its Refusal To Identify The Controlling State Law, The Court Of Appeals Has Improperly Insulated Its State Law Holdings From Correction.

In a case like the present one, governed by *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), a federal tribunal must apply the choice of law rules as well as the substantive law of the state where it is sitting, *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1949), acting as though it were "in substance, 'only another court of the State.'" *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956), *quoting Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945).[2] Although the Court of Appeals acknowledged that New York, Pennsylvania, Connecticut, Delaware, Massachusetts, and the District of Columbia had jurisdictional contacts with the parties, the court concluded that it was not necessary to identify whether the law of these — or any other — jurisdictions would govern its decision, nor to put itself in the shoes of any state court.[3] App. 10a-11a

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[2] Although the Court of Appeals for the District of Columbia Circuit maintains that it is not required by *Erie* to apply the local law and choice of law rules of the District of Columbia courts in diversity cases, it has chosen to do so. *Lee* v. *Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979). The policy is to preclude unfairness resulting from material differences between cases brought in the local courts of the District and those brought in the federal courts. *Walko Corp.* v. *Burger Chef Systems, Inc.*, 554 F.2d 1165, 1171 (D.C. Cir. 1977). In the District the relationship of the federal to the local judiciary is, therefore, "akin to that historically existent in the states." *Steorts* v. *American Airlines, Inc.*, 647 F.2d 194, 196 (D.C. Cir. 1981).

[3] The Court of Appeals noted that neither the District Court nor the parties had addressed the issue of the controlling law, but that it was "unnecessary, however, to reach the issue of the applicable state law." App. 12a n.10, slip op. at Fn.3. n.10. *Amici* here had raised the issue in their brief to the Court of Appeals. *Brief for Amici* at 25-28. Moreover, that court has previously noted its power to take judicial notice of applicable state law or to remand

n.10[4], slip op. at Fn.3. n.10. The following rationale was given:

> "We find it unnecessary, however, to reach the issue of the applicable state law. . . . [N]one of the laws of these states gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of law. There is what some have termed a 'false conflict.'" App. 10a-11a n.10, slip op. at Fn.3. n.10.[5]

A federal court's *Erie* responsibilities cannot be discharged, however, by the device of reducing all state contract laws to general rules of construction, and then asserting that, at such a "basic" level, there is no conflict. As Justice Holmes said long ago in a different context, "General propositions do not decide concrete cases." *Lochner* v. *New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). In the present instance, the Court of Appeals' refusal to identify those states with actual interests in these contracts, its failure to consider the laws of those states with potential interests, and its decision not to identify the controlling substantive law, all violate the holdings of this

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for its consideration where the matter was not adequately dealt with by the trial court. *Jannenga* v. *Nationwide Life Ins. Co.*, 288 F.2d 169, 172 (D.C. Cir. 1961).

[4] Appendix references are to the appendix to the petition of Insurance Company of North America, No. 81-1012.

[5] Professor Leflar, who is cited as authority for the court's conclusion that there is a "false conflict," defines that situation as a case "in which the laws of the two or more involved jurisdictions are the same, or would produce the same result in the case being litigated." R. Leflar, *True "False Conflicts," Et Alia*, 48 B.U.L. Rev. 164, 171 (1968). The Court of Appeals concluded only that the laws of these six jurisdictions did not provide "specific guidance," and that, on the most general level, the "basic principles governing the interpretation of insurance policies" were the same. This is no substitute for the identity of controlling law envisioned by Professor Leflar. *See*, by way of contrast, *Gaither* v. *Myers*, 404 F.2d 216 (D.C. Cir. 1968).

Court and effectively permit the Court of Appeals to create general state common law.

The obligations of a federal court in diversity to identify and apply the law of the appropriate state forum cannot be circumvented by a refusal to choose controlling law.[6] This is particularly true with insurance contracts which have historically been controlled by state substantive law.[7] In *Griffin* v. *McCoach*, 313 U.S. 498 (1941), this Court reviewed a decision by the Fifth Circuit on the applicability of Texas law to a foreign insurance contract. The court below had concluded "that it is immaterial in so far as the decision of this case is concerned, whether the law of Texas or the law of New York be applied." *Griffin* v. *McCoach*, 116 F.2d 261, 264 (5th Cir. 1940), *rev'd*, 313 U.S. 498 (1941). This Court reversed, holding that the federal courts below

> "[W]ere applying rules of law in a way which may or may not have been consistent with Texas decisions. Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary. . . . But this is something

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[6] The Sixth Circuit in *Insurance Co. of N. America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), recognized the need to identify the controlling law, and while *amici* believe the decision incorrectly applied the relevant state law of New Jersey and Illinois, they do not fault the identification of the controlling law in that case. The Fifth Circuit in *Porter* v. *American Optical Corp.*, 641 F.2d 1128, 1144-46 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), assumed that the contracts were controlled by the law of "Louisiana or . . . a state where the law would be the same as Louisiana," but it did not discuss any state authority and based its exposure interpretation exclusively on *Forty-Eight*.

[7] Regulation of the business of insurance is particularly a state function. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976). Moreover, this Court has expressly recognized that "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, *interpretation*, and enforcement — these [are] the core of the business of insurance." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969) (emphasis supplied).

> to be decided according to Texas decisions, to none of which the opinion [below] refers. . . . The decision must be reversed and remanded to the Circuit Court of Appeals for determination of the law of Texas as applied to the circumstances of this case." 313 U.S. at 503-04.

In the same way, the Court of Appeals here has not satisfied its federal obligation to identify and apply the appropriate state law. Indeed, the Court of Appeals expressly stated that it found no need to accept that responsibility, App. 10a n.10, slip op. at Fn.3. n.10, and instead assumed that it was empowered to establish a general law of contract interpretation with ramifications far beyond the four corners of the decision.[8]

Unless the corrective supervision of this Court is applied,[9] the Court of Appeals' erroneous method of decision will effectively preclude correction of its erroneous substantive holdings. Unlike the usual instance in which nonparties like *amici* will eventually be able to obtain — perhaps by way of declaratory judgment — a state law decision in the courts of the appropriate state, insurers here are left without such a remedy.[10] Where the Court of Appeals

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[8] In her separate opinion, Judge Wald notes that the majority's approach "not only provides a flexible formula for adjudicating the legal issues associated with asbestos-related diseases, but also sets a useful precedent for other product-exposure injuries, as of yet unknown in origin." App. 43a, slip op. at 2 (Wald, J., concurring in part).

[9] More recently, this Court has reminded the federal courts of their obligation to apply local law in diversity actions. Where the Fifth Circuit had relied on federal interests and policies to hold that the laws of the forum state should apply to a tort action based on a death in Cambodia, this Court vacated the judgment based on *Klaxon* and remanded with the direction that exceptions based on federal policy concerns should not be engrafted onto state law. *Day & Zimmerman, Inc.* v. *Challoner*, 423 U.S. 3 (1975) *(per curiam)*.

[10] A federal court in diversity is to apply the "*then* controlling decision of the highest state court." *Vandenbark* v. *Owens-Illinois*

bases its decision on general state common law and refuses to act as the court of a state applying a particular state's laws, it insulates the decision from correction.

Even if *amici*'s search for state redress was directed to each of the six jurisdictions mentioned by the Court of Appeals, the federal concern raised by the decision cannot realistically be resolved by the highest courts of those jurisdictions. While each court can indeed correct misapplications of the substantive law of its own state, it cannot correct the Court of Appeals' perception and application of general state common law; only authoritative determinations from all involved states could do that. The result creates a judicial dilemma with serious implications for federal-state relations, and for litigants in the federal system.

II. The Court Of Appeals' Incorrect Approach To The Determination Of State Law Recreates The Pre-*Erie* Situation, Permitting Conflicts Between Federal And State Courts And Among Federal Circuits.

In a diversity action, the method by which a federal court ascertains state law is, of course, a federal matter, subject to supervision by this Court. *See, e.g., Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169, 177-180 (1940) (Hughes, C. J.).[11] Under *Guaranty Trust Co.* v. *York,* 326

Glass Co., 311 U.S. 538, 543 (1941) (emphasis supplied). Where state law applied by a lower federal court to a diversity case is corrected by the relevant state courts during an appeal period, the federal judgment must be reversed. *E.g., Samuels* v. *Doctors Hosp., Inc.,* 588 F.2d 485 (5th Cir. 1979); *Community Nat'l Bank* v. *Fidelity & Deposit Co.,* 563 F.2d 1319 (9th Cir. 1977).

[11] The correct approach to the ascertainment of state law was established first by *Field* and other cases decided during the same Term, *see Six. Cos.* v. *Joint Highway Dist. No. 13,* 311 U.S. 180 (1940); *West* v. *Am. Tel & Tel. Co.,* 311 U.S. 223 (1940); *Stoner* v.

U.S. 99, 108 (1945), a federal court in diversity acts as another court of the state, and the law applied is derived from the sources in that jurisdiction. To that end,

> "[T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

The Court of Appeals in this case impermissibly failed to act as though it was a state court, bound to apply the law of that jurisdiction. Although the court observed that the laws of at least six jurisdictions might arguably apply,[12] it purported to rely on none of them. Rather, the court referred only to "basic principles governing the interpretation of insurance policies"[13] which it found common to all six jurisdictions. App. 11a n.10, slip op. at Fn.3a. n.10.

New York Life Ins. Co., 311 U.S. 464 (1940); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), and is summarized in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203-05 (1956).

The principles of governing ascertainment of state law, however, should be distinguished from the mechanics by which such law is determined. As to the latter, this Court has never thought it necessary or appropriate to offer instructions. *See, e.g., Lehman Bros.* v. *Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring). As to the former, this Court continues to cite the line of cases summarized in *Bernhardt*. *See, e.g., Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316 n.14 (1980); *Wolston* v. *Reader's Digest Ass'n Inc.*, 443 U.S. 157, 160-61 n.1 (1979).

[12] While it is certainly possible that six individual contracts with identical terms could be governed by the law of six different states, it is not possible for any single contract to be so governed. Moreover, the court virtually ignored the law of the six jurisdictions which had been mentioned and cited no authority for some of its most important holdings. *See, e.g.*, App. 26a-29a, slip op. at 19-23 (coverage to insured for periods when it elected not to be insured).

[13] Citing commentators but not case law, the court outlined two principles which apparently controlled its various holdings: (i)

This method of decision violated the obligations of a federal court under the principles established by *Erie*. The Court of Appeals acknowledged that decisions from at least one of these six jurisdictions — New York — addressed the interpretation of insurance contracts where coverage for disease claims was at issue, and it recognized that these cases reached a result contrary to the court's own view. App. 16a, 19a-20a & n.17, slip op. at 9-10, 12-13 & n.17 at Fn.4.-5. Rather than follow those decisions, however, the court chose to impose its own contrary views of general state common law.[14]

Disregard of state authority by a federal court in diversity has been allowed by this Court only in certain identifiable circumstances. Recognized exceptions include:

> " . . . confusion in the [state] decisions, . . . developing line of authorities that casts a shadow over the established ones, . . . dicta, doubts or ambiguities in the opinions of [state] judges on the question, . . . legislative development that promises to undermine the judicial rule." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 205 (1956).

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indemnity is the dominant purpose of insurance policies; and (ii) insurance is a purchase for a premium of certainty against loss. App. 11a-12a, slip op. at 7. The court also noted that ambiguities are to be construed in favor of the insured, but it chose not to rely on that principle. App. 12a, slip op. at 8. It further noted that the reasonable expectation of the insured should be a "guide" to "discerning the principles embodied in the policies." *Id.* Elsewhere, the court cites the expectation of the insured as a general principle relating to a contract of adhesion. App. 13a n.12, slip op. at Fn.3b. n.12. This principle is then cited as a "base" for the interpretation of the policies. *Id.*

[14] Although the court observed that health care precedents are "more relevant to this case" than other authority, it declined to follow New York authority because the "problem . . . is to determine when a disease begins for coverage purposes." App. 16a n.17, slip op. at Fn.5.-6. n.17. The definition of disease and determination of coverage, however, were precisely the issues to be resolved under the policies considered in *Keene* and were the same issues passed on by New York courts.

Although none of these justifications was present in this case, the Court of Appeals nevertheless made a series of unprecedented rulings: (i) coverage exists under both manifestation and exposure interpretations (as well as its own judicially created doctrine of exposure in residence); (ii) pro rata allocation of liability among insurers is precluded; (iii) coverage will be provided for the insured during periods when it had voluntarily elected not to be insured; and (iv) the insured will be sole arbiter of the policies which shall provide coverage for given injuries. The necessary corollary of the judgment is that New York, Pennsylvania, Delaware, Connecticut, Massachusetts, and the District of Columbia would have ignored their precedents and each dramatically revised its decisional law of insurance to reach these results.[15]

In fact, of course, the Court of Appeals has simply substituted its own notions of policy for the law already established by the state courts' decisions. Moreover, because the Court of Appeals' decision is based on a federal formulation of general state common law, it cannot be corrected by the subsequent decision of a particular state court. That result fosters two judicial evils which require this Court's attention.

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[15] Insofar as the Court of Appeals' decision rests on the view that liability on insurance contracts should parallel liability to the tort claimants themselves under the principles of *Borel* v. *Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), there appears to have been a complete failure to analyze state law. Even if *Borel* stated the applicable law of all six jurisdictions identified by the Court of Appeals, which it does not purport to do, and even if the law of those six jurisdictions covered the underlying tort claims, which may or may not be the case, there is still no authority for the proposition that the law of these six jurisdictions would import tort principles into the area of insurance contract interpretation. The Fifth Circuit itself has recently made it clear that *Borel* was not intended to enunciate sweeping principles of tort liability. *Migues* v. *Fibreboard Corp.*, 50 U.S.L.W. 2365 (5th Cir. Dec. 7, 1981). *A fortiori*, *Borel* is not a basis for transforming individual insurance contracts into assumptions of group liability.

First, the Court of Appeals' approach is in derogation of the *Erie* command that uniform state substantive law shall apply in state and federal courts. If a federal court in diversity proceedings may disregard its obligation to act as a court of the state where it sits, and if it is free to make general state common law, different substantive law will apply in each forum. Because the federal formulation will be uncorrectable in a state court, forum shopping will follow.

Second, the Court of Appeals' decision creates unacceptable inconsistencies within the federal system. Under the *Keene* decision, the Court of Appeals' rule of indemnity and defense under any contract interpretation will apply to all actions filed in the District of Columbia. At the same time, the decision of the Fifth Circuit in *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), which also failed to look to the applicable state law, will provide litigants with an exposure interpretation. Consequently, the methodology of the decision — which can only be corrected on certiorari — also leads to the evil of forum shopping among the federal courts.

III. The Creation And Application Of General State Common Law By A Court Of Appeals Violates Constitutional Guarantees Of Due Process And Requires Correction By This Court.

Application of state law is subject to constitutional supervision under the due process clause of the Fourteenth Amendment. *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930); *Aetna Life Insurance Co.* v. *Dunken*, 266 U.S. 389 (1924). *See* Note, *Unconstitutional Discrimination in Choice of Law*, 77 Colum. L. Rev. 272 (1977). Where a federal court sits in diversity, its choice and application of state law is subject to review under the same constitutional limitations. *Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179

(1964) (choice of Florida over Illinois law by federal courts); *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954) (diversity case interpreting products liability insurance).

The applicable constitutional standards were restated by this Court last Term in *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981) (life insurance contracts). Speaking for a plurality,[16] Justice Brennan observed:

> "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that its choice of law is neither arbitrary nor fundamentally unfair." 449 U.S. 312-13.

The Court of Appeals' reliance on general state common law is constitutionally suspect under this test, and the decision should be reversed before this method is relied on in other progressive disease cases.

The Court of Appeals not only declined to analyze state contacts with these insurance contracts, but also expressly refused to select and apply the law of any state.[17] Instead, the court created its own detailed scheme of substantive insurance law from its general notion that an insured is always entitled to be indemnified. To satisfy the constitutional analysis of contacts and determination of state interest under *Hague*, however, a federal court in diversity

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[16] Justice Brennan's opinion was joined by Justices White, Marshall, and Blackmun. Justice Stevens wrote a separate opinion concurring in the judgment. Justice Powell, joined by the Chief Justice and Justice Rehnquist, filed a dissent arguing, *inter alia*, that there were insufficient contacts to satisfy constitutional requirements. Justice Stewart did not consider or participate in the decision.

[17] While more than one state "may have sufficiently substantial contact with the activity in question" to satisfy constitutional requirements, the forum state must choose the law it would apply to the case "by analysis of the interests possessed by the States involved." *Richards* v. *United States*, 369 U.S. 1, 15 (1962).

must act as the court of a state and identify the state substantive law relied upon in deciding a given issue. If the approach taken by the Court of Appeals is allowed to stand, federal courts in diversity will be empowered to announce general state common law without regard to the foundations and fundamental fairness of their decisions.

Where a federal court declines to identify the governing law and employs this mode of analysis to support its conclusions, and where the issues presented affect long-recognized individual state interests in the interpretation of insurance contracts,[18] a question of serious constitutional dimension is raised. Where that same court reaches a result which provides coverage to the insured for periods where it elected not to be insured[19] — and cites no authority whatsoever in support of that result[20] — it has taken property without due process of law and created a profoundly troubling precedent for other litigants in the federal system.[21]

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[18] *See supra* note 7.

[19] *See supra* p. 10 & note 12.

[20] The only authority noted is *Insurance Co. of N. America* v. *Forty-Eight Insulations, Inc., supra* note 5, a decision which expressly refused to follow this reasoning. The Sixth Circuit declined to reach this conclusion, as Judge Bazelon notes, because this interpretation would entitle the insured to benefit from coverage it never bought. App. 28a & n.30, slip op. at 21 & n.30 at Fn.11.

[21] Judge Wald has already suggested that the Court of Appeals' common law "formula" will be a useful precedent for other progressive disease cases. *See supra* note 8. Indeed, *Keene* is already being cited by litigants in other courts of appeals as the only proper analysis of asbestos-related insurance coverage questions. *E.g.*, Brief for Plaintiff-Appellant at 27-30, *Eagle-Picher Indus., Inc.* v. *Liberty Mut. Ins. Co.*, No. 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed*, Nos. 81-1761, 81-1762, 81-1763 (1st Cir. filed Sept. 25, 1981).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition of Liberty Mutual Insurance Company, *amici* urge this Court to grant the petition.

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1328

IN THE

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Petitioner

v.

KEENE CORPORATION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER LIBERTY MUTUAL INSURANCE COMPANY

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February 26, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER LIBERTY MUTUAL INSURANCE COMPANY

Keene's brief in opposition contains two serious factual misrepresentations which cannot be permitted to stand uncorrected. In addition, that brief and the brief in opposition of the Armstrong *amici curiae* misstate the issues raised by the petitions in several respects.

1. Nothing is more directly pertinent to the instant litigation than the insuring agreement in the policies before the Court, so it is understandable that Keene should begin its brief in opposition with a quotation of that language. Unfortunately, however, by artful employment of ellipses and selective quotation, Keene has omitted the language most salient to the dispute. In doing so it has launched its entire argument from the wrong foot,

basing it upon a fictitious agreement which none of the parties entered into.

Stating that the insuring clause of the policies sold to Keene "clearly provides coverage for Keene's legal liability for 'all sums' which are paid to the claimants in the underlying asbestos lawsuits," Keene "quotes" the pertinent policy language as follows:

> [t]he [insurance] company will pay on behalf of the *insured* [policyholder] all sums which the *insured* shall become legally obligated to pay as damages because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* [policyholder] seeking damages on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent . . .

Keene brief at 2-3. The phrases in italics are defined terms. What Keene attempts to obscure is that the *bodily injury* to which the policy applies is specifically defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Joint App. I at 75; emphasis added. The court of appeals at least referred to the underlined language, though it rendered it nugatory by holding that "injury" that occurred in 1980 is covered by a policy written in 1950. Slip opinion at 6. Keene omits this critical language altogether.

2. In support of its argument that this case concerns matters of state law not susceptible of resolution by this Court, Keene makes a statement that might be compelling, if it were true. Keene states that, "In its *certiorari* petition in *Forty-Eight*, Liberty argued (at 6-7) that the asbestos insurance coverage issues presented a 'matter of contract interpretation as to which this Court's exercise of its *certiorari* power would not be appropriate.' " Keene brief at 6. Not only has Keene left out the most impor-

tant part of the sentence supposedly quoted, however, but here it has not even been forthright enough to indicate by ellipsis that it is omitting something. What Liberty actually said in the sentence referred to was that certiorari would not be appropriate "but for one fact." The next sentence in Liberty's petition in *Forty-Eight* identifies that fact as the Sixth Circuit's impermissible reversal of the burden of proof applicable to insurance coverage disputes under state law. That same improper reversal of the burden of proof flaws the District of Columbia Circuit's opinion here, in addition to its other errors of law.

3. Both Keene and the Armstrong *amici* spend much time subduing a straw man. They argue that petitioners are "asking this Court to federalize insurance contract interpretation questions," or "to undertake the unusual step of enunciating a 'nationwide' rule on a non-federal issue." Keene brief at 5, Armstrong brief at 6. These arguments turn things inside out.

To the contrary, Liberty contends that the principal shortcoming of the District of Columbia Circuit's opinion is that it eschewed any meaningful consideration of the state precedents which bear on the issues. Instead, the court said that it was "unnecessary" to consider state authorities in any meaningful fashion and reduced the insurance law of fifty states to a meaningless generality, that insurance policies have a "dominant purpose of indemnity." Slip opinion at 10, n. 10, 12. By ignoring the ordinary meaning rule followed in New York, and refusing to mention, much less follow, state law decisions determining when injury or disease occurs for insurance purposes, it is the court below which "federalized" the issue. Slip opinion at 16, n. 17.

4. The efforts of those opposing certiorari to paper over the complete conflict in the federal courts on the asbestos coverage issue are unavailing. Those decisions are flatly

irreconcilable, and their differences of analysis and result can by no stretch of the imagination be attributed to any differences perceived in the state law being applied. The problem is that the circuit courts did not rely on state law in this and other crucial determinations.[1]

In *Forty-Eight*, the Sixth Circuit cited New Jersey and Illinois cases that insurance policies must be broadly construed so that ambiguities are resolved in favor of the insured; otherwise that court did not rely upon any decisional law from those states to support its result. In *Porter*, the Fifth Circuit was supposedly governed by Louisiana law, but in adopting the reasoning and result of *Forty-Eight* the court did not even consult, much less apply, the law of that state. Nor can it be argued that the Court below relied upon state law. Indeed, it attempted to justify its failure to do so by claiming that "[n]one of the laws of these states gives us *specific* guidance in resolving this case. . . ." (emphasis supplied). Instead, it relied upon what it called "basic principles governing the interpretation of insurance policies." Slip opinion at 11, n. 10.

There is only one proposition which all of the decided federal cases will support. That is that Keene and the Armstrong *amici* are wrong when they argue that the hopeless split of opinion among the federal courts results from any permissible difference in state substantive law being applied.

It is equally impossible to harmonize the federal decisions on the basis of the relief sought by the parties in each action. The Armstrong *amici*, for example, argue that the insured in *Forty-Eight* limited its argument to positions "devised by the insurance industry" and did not raise the arguments pressed successfully by the insured

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[1] In *Eagle-Picher* the District Court found that the law of Ohio, Illinois and England was the same.

in this case. Armstrong brief at 7, n. 3.[2] In fact, however, the insured there cross-appealed and vigorously argued in the Sixth Circuit that the entire cost of defending each of the underlying actions should be borne entirely by the insurers, even though it was uninsured for part of the exposure period. While the court below accepted that argument, and applied it to indemnification as well as to defense, the Sixth Circuit squarely rejected it as unfair and irrational. "Were we to adopt Forty-Eight's position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result." 633 F.2d at 1225. In dissenting below, Judge Wald reached the same conclusion as the Court in *Forty-Eight*. The split in the federal decisions, accordingly, cannot be explained away by any rationale that undercuts the need for clarification by this Court.

5. None of the parties opposing certiorari has even attempted to deny the points Liberty makes concerning the far-reaching and disruptive effects the split in the federal courts will have upon the handling of the thousands of underlying cases. After five years of litigation and four federal court decisions,[3] Liberty has been instructed to handle Eagle-Picher's cases on one basis, Forty-Eight Insulation's on another, and Keene Corporation's on a

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[2] Even if this point were true, which it is not, it would be difficult for those opposing certiorari to make much of it. The District of Columbia Circuit stated in its December 21, 1981 order amending its opinion that ". . . we do not rely, however, on any legal or factual aspect of Keene's argument . . ."

[3] It is impossible to place the decision in *Commercial Union Insurance Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) in the camp of any of the previously mentioned decisions, for it cites *Keene*, and *Forty-Eight* both but does not choose between them.

third basis. What Liberty is supposed to do with respect to the defense and indemnification of its numerous other insureds in underlying actions is now anybody's guess.

If this court clarifies the extent to which the federal courts must apply existing state law involving such matters as the burden of proof, the ordinary meaning rule, and when injury or disease has been held to occur in other insurance contexts, Liberty and the numerous other parties involved in the nationwide coverage litigation can at least make an intelligent assessment of what their responsibilities will be held to be, based upon the state law which will be applicable in each case. As things stand now, however, there is no way for anyone even to guess how the next federal coverage case will be approached, much less resolved. If the decision below stands, long standing rules of law in the insurance area will have no predictive value at all, for the federal courts will follow them only if they are "willing to accept the consequences that it would imply for the contracts before us." Slip opinion at 16, n. 17. The implications which this uncertainty will have on the settlement and trial of the thousands of underlying actions do not require elaboration.

6. Keene's accusation (at 3) that the manifestation interpretation sought by Liberty and several petitioners is a "newly fabricated" means of avoiding liability would not deserve comment, except that the boldness of the charge might make a lack of rebuttal stand out. In New York the rule that injury or disease occurs, within the meaning of an insurance policy, only when it reveals itself was "fabricated" at least forty years ago, in *Reiser v. Metropolitan Life Insurance Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd mem.*, 289 N.Y. 561, 43 N.E. 2d 534 (1942). The Second Circuit was guilty of the same "fabrication" in *Grain Handling Co., Inc. v. Sweeney*, 102 F.2d 464, 466 (2d Cir. 1939) (Learned Hand, J.); *Travelers Insurance v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 9 (1955); and *General*

Dynamics Corp. v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977). The last of these cases applied this common sense holding to asbestosis claims. Indeed, this Court itself applied the same reasoning to a statute of limitations case involving silicosis, in *Urie v. Thompson*, 337 U.S. 163, 168-70 (1948). It is understandable that Keene's financial interest might lead it to dislike the rule that was so well established before the 1980 decision in *Forty-Eight* and the decision below, but to call that rule a "new fabrication" is preposterous.

Keene devotes much of its brief to quoting portions of the "ample factual record in this case" in an attempt to support the opinion by the court of appeals. Keene brief at 17-23. Keene fails to explain, however, that none of the "evidence" which it cites was considered or relied upon by the courts below. The district court had confined its consideration to the policies themselves and medical testimony as to asbestosis. Speaking of issues which Keene had tried to inject, the district court found "that some of these issues have no bearing on resolution of the instant motion" for summary judgment and then expressly limited the evidence that it would receive to "[i]nterpretation of the phrase 'bodily injury caused by an occurrence' within the meaning of the policies and aided by competent medical testimony." Joint App. VI at 2363.

The district court's refusal to consider this "evidence" did not prevent Keene from referring to it at length in the court of appeals, and now in this Court. It is impossible to know how much the court of appeals was influenced by such material in light of the statement in its December 21, 1981 order that: ". . . we do not rely, however, on any legal or factual aspect of Keene's argument. . . ." One thing which is clear, however, is that if the court below had fully reviewed the record, it could not possibly have made the findings upon which its origi-

nal opinion rested as to Keene's expectations.[4] The employee in charge of Keene's insurance, for example, testified that if the policies were interpreted as he thought they should be, "Basically what it meant is that Liberty Mutual shouldn't be liable. Q. Why not? A. Because they only started [insuring Keene] in 1974 and they finished manufacturing the product in 1973. That didn't make any sense to me." Feick depo. at 304-305, Joint App. VIII at 2815-2816. His superior, Keene's treasurer Robert Prata, said the same thing: "I think if the exposure period was outside the year of coverage by a carrier, the carrier would not have the liability." Prata depo. at 125, Joint App. VIII at 3209. Here we have to agree with Keene's officials and not its lawyers; the opinion below does not "make any sense" except as an *ad hoc* fabrication to give the insured a free ride no matter what the agreements say, the evidence shows, or the governing state law provides.

The Armstrong *amici* also argue that the insurance policies are ambiguous and must therefore be construed in favor of the insured. The district court, however, not only made no finding of ambiguity but excluded most of the evidence which Keene sought to inject. The District of Columbia Circuit, however, in effect reversed the dis-

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[4] Originally the court below said that ". . . we . . . explicitly base our interpretation of the policies on the reasonable expectations of Keene." Slip opinion at 13, n. 12. No findings had been made on this point by the district court, however, and the court of appeals referred to no evidence of what Keene's expectations might have been. We cited the above testimony in our petition for *en banc* rehearing. After that was denied, the court below "*sua sponte*" filed its order of December 21, 1981 and said the following of its original rationale: "At the end of footnote, delete 'the reasonable expectations of Keene' and replace with 'the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language.'" As amended, the opinion below thus rests upon the expectations which Keene would have held if it had not held different expectations!

trict court on this point and held that ". . . particular terms of the policies are ambiguous as applied to asbestos-related diseases. . . ." Slip opinion at 12.

What neither the court below nor the Armstrong *amici* can justify, however, is how to reconcile the supposed "ambiguity" of the policies, the summary judgment below, and the principle recognized by the District of Columbia Circuit, just two weeks after its decision in the instant case, in *Davis v. Chevy Chase Financial Ltd.*, —— F.2d ——, No. 80-1297 (D.C. Cir. Oct. 15, 1981). In *Davis* the court held that summary judgment in a case involving contract interpretation ". . . is appropriate only when the relevant provisions are so straightforward that they can be read in but one way. . . . Where a contract is not 'wholly unambiguous,' the parties have the right under principles of American contract law to present oral testimony and other extrinsic material to aid in its interpretation." Slip opinion at 18-19. The court thus reversed the district court's granting of summary judgment because ". . . we cannot agree that this Agreement was susceptible of but one reasonable interpretation." *Id.* This rule is well established in the numerous cases referred to in *Davis*, and was applied to an insurance contract in *General Accident Fire & Life Assurance Corp. Ltd. v. Akzona, Inc.*, 622 F.2d 90, 93 (4th Cir. 1980).

On the present record, therefore, it would be procedurally impossible to uphold the District of Columbia Circuit's reversal of the trial court on the strength of the "evidence" which fills the briefs in opposition.

CONCLUSION

Only a definitive statement by this Court as to how much interpretative latitude the lower federal courts may exercise in reversing, distinguishing, and ignoring state precedents in this asbestos insurance coverage litigation will permit the numerous parties in this case, and the

dozens of parties in similar cases throughout the country, to proceed with the settlement and defense of the thousands of underlying cases with any possibility of understanding their respective rights and obligations therein. The petitions should be granted.

Respectfully submitted,

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February 26, 1982